Filed 7/30/19 Cvetanovic v. TheAreospace Corp. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MIKEL CVETANOVIC, Plaintiff and Appellant, v. THE AEROSPACE CORPORATION, Defendant and Respondent.	B289220 (Los Angeles County Super. Ct. No. BC555514)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Mikel Cvetanovic, in pro. per., for Plaintiff and Appellant.

Proskauer Rose, Kate S. Gold and Philippe Lebel for Defendant and Respondent.

Mikel Cvetanovic (appellant) appeals from a judgment entered after the trial court granted summary judgment in favor of The Aerospace Corporation (respondent) on appellant's claims for disparate treatment, age discrimination and retaliation.

Appellant, who appears before this court in pro. per., makes no comprehensible factual or legal argument that the judgment was entered in error. Therefore, we affirm the judgment.

BACKGROUND

Because appellant has failed to provide citations to the record supporting the statement of the case or statement of facts in his opening brief, we rely exclusively on the factual statement and appendix filed by respondents.

Respondent is a federally-funded research and development center responsible for providing objective technical analyses and assessments primarily to the federal government on launch, space, and related ground systems that serve the national interest. Appellant is a software engineer who began working for respondent in 2006. At the time he was hired by respondent, appellant was 43 years old.

For the duration of his employment, appellant was subject to the collective bargaining agreement (CBA) between respondent and Aerospace Professional Staff Association (union). Consistent with the CBA, appellant received an annual performance evaluation. Each of appellant's performance reviews since 2009 identified performance deficiencies.

In late 2011, respondent became aware of projected budget cuts that would have a significant impact on its funding. Respondent began to prepare for a company-wide reduction in force (RIF) that would affect roughly 10 percent of its employees. Ultimately 306 of 4,000 employees were terminated by the RIF,

including 194 bargaining unit employees such as appellant. The selection of employees eligible for the RIF began with respondent's bin ranking system, which ranked employees based on their performance skills. Bin 1 was the highest, and bin 5 was the lowest. Appellant was ranked in bin 4 in 2009 and bin 5 in 2010 and 2011. The RIF selection pool included employees ranked in bins 4 and 5 in 2011, as well as new employees who had not yet been ranked, and employees on displaced status, meaning their functional role was no longer needed in the organization. Managers were asked to review the RIF eligible employees in their units. Appellant's managers selected appellant for inclusion in the RIF. On March 29, 2012, appellant's managers informed appellant that he had been selected for the RIF and that his employment would end in nine weeks, which it did.

After the RIF, 72 percent of the remaining employees in appellant's directorate were older than 50, and 79 percent were 40 years old or older. Respondent did not hire anyone to replace appellant, and eliminated his position. Two employees with pre-existing duties took on some of appellant's responsibilities. One of them was 33 years old and the other, 50 years old at the time of the RIF.

PROCEDURAL HISTORY

On March 15, 2013, appellant filed his charge with the California Department of Fair Employment and Housing (DFEH), which was cross-filed with the United States Equal Employment Opportunity Commission (EEOC). Appellant alleged that he had been discriminated against based on his age. Appellant received his DFEH right to sue letter on March 27, 2013, and his EEOC right to sue letter on May 21, 2014.

Pleadings and demurrers

On August 22, 2014, appellant and another former employee of respondent, Marilyn A. Sperka, filed their original complaint against respondent, alleging a single cause of action for harassment, discrimination, and retaliation on the basis of age. Neither alleged any disparate impact or class claims in the complaint.

Appellant and Sperka filed their first amended complaint (FAC) on March 23, 2015, alleging: (1) a first cause of action, brought by Sperka, for discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA); (2) a second cause of action, brought by appellant, alleging discrimination, harassment and retaliation in violation of FEHA; (3) a third cause of action, brought by appellant against his former manager Andrew Dawdy, alleging harassment and aiding and abetting violations of FEHA. Neither appellant nor Sperka alleged disparate impact or class claims.

On July 2, 2015, respondent filed a special demurrer to the FAC arguing that appellant and Sperka had improperly combined multiple claims into hybrid FEHA causes of action. The motion was unopposed, and the trial court sustained the demurrer, allowing appellant and Sperka to file a second amended complaint.

On October 22, 2015, appellant and Sperka filed a second amended complaint (SAC) with a new first cause of action for disparate impact age discrimination in addition to their previous FEHA and related claims. The SAC contained no class claims.

On November 20, 2015, respondent filed a demurrer to the SAC, seeking dismissal of appellant's purported disparate impact claim and the purported claims against Dawdy on the ground

that such claims had not been administratively exhausted. In October 2016, the trial court sustained the demurrer without leave to amend.[1] The court in its minute order noted that appellant and Sperka failed to administratively exhaust any disparate impact claim. In addition, appellant had not exhausted any FEHA claims against Dawdy. Dawdy was dismissed from the lawsuit.

Appellant, separately from Sperka, filed a third amended complaint (TAC) against respondent on November 10, 2016. The TAC contained two causes of action: (1) age discrimination (disparate treatment); and (2) retaliation.

Respondent's summary judgment motion

On May 8, 2017, respondent filed its motion for summary judgment. As to appellant's age discrimination claim, respondent argued that appellant could not establish a prima facie case, that respondent had legitimate, nondiscriminatory reasons for the termination, and that appellant could not show that respondent's nondiscriminatory reasons were pretextual. As to appellant's retaliation claim, respondent argued that appellant failed to exhaust administrative remedies; did not engage in any protected activity; and had no evidence that respondent's legitimate reasons for his termination were pretextual.

On January 26, 2018, the trial court granted respondent's motion for summary judgment.

Appellant's appeal

On March 29, 2018, appellant filed his notice of appeal following the trial court's order granting summary judgment. In

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[1] The trial court noted that the hearing on respondent's demurrer had been repeatedly continued.

his April 6, 2018 notice designating the record on appeal, appellant indicated that he would proceed by appendix, without a transcript of the oral proceedings below. The appendix filed by appellant contained only three documents: (1) the SAC; (2) the trial court's judgment following its entry of the order granting summary judgment; and (3) appellant's declaration submitted with his opposition to respondent's motion for summary judgment.

On April 11, 2018, this court sent the following to both parties: "If no reporter's transcript was designated, the parties are to brief, . . . the issue of whether the absence of a reporter's transcript or suitable substitute of the relevant hearings warrants affirmance based on the inadequacy of the record. (See *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, and cases cited therein.) The parties are to discuss this issue in their briefs." Appellant failed to discuss this issue in his briefs on appeal.

DISCUSSION

I. Appellant has forfeited his arguments on appeal

Appellant's briefs, and the record he has provided, do not provide sufficient information for a determination of the legal and factual basis for this appeal.

A judgment or order of the lower court is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Ibid.*) Thus, it is appellant's obligation to articulate claims of reversible error and "present

argument and authority on each point made." (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591.) An appellant's failure to meet this burden may be considered an abandonment of the appeal. (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.)

Appellant has failed to satisfy these obligations in this appeal. His opening brief is devoid of citations to the record. The record provided by appellant is thus deficient. In addition, appellant has failed to cite supporting legal authority for the points he attempts to make.[2] We are "'not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. . . . Accordingly every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of [appellant], not of the courts, 'by argument and the citation of authorities to show that the claimed

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[2] It appears that appellant has included portions of a brief on a different case, involving class action claims, "Tameny" claims (see *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71 [creating exception to an employer's right to discharge at-will employees if the employee can show the employee was discharged in violation of public policy]), and alleged administrative errors by the EEOC into his opening brief. This portion of appellant's opening brief does cite legal authority. However, appellant never attempted to bring any class claims, and does not articulate any Tameny claims. Further, appellant points to no facts in the record suggesting that the EEOC made errors resulting in incomplete charges. For these reasons, the legal authority in this section of appellant's brief is irrelevant.

error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

Appellant's decision to act as his own attorney on appeal does not entitle him to any leniency as to the rules of practice and procedure. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)[3]

Since the issues in appellant's opening brief are not properly presented or sufficiently developed to be cognizable, we decline to consider them and treat them as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

II. Appellant's arguments fail

To the extent that we can ascertain appellant's arguments and the relevant facts, we briefly address these claims. Although appellant's brief does not state a comprehensible argument, he attempts to argue that the trial court erred in "ruling out class disparate impact charges." While appellant did not allege any class claims below, his disparate impact claims were dismissed when the trial court sustained a demurrer on the ground of failure to exhaust administrative remedies. We note that the standard of review for an order sustaining a demurrer is de novo.

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[3] Nor does appellant's decision to act as his own attorney entitle him to be disrespectful to this court or his opposing counsel. Appellant begins his reply brief with the one-word sentence: "Hi." Appellant proceeds to inform the court that "Google" is his attorney. Appellant has routinely filled in the name of his law firm as "Guardians of the Galaxy." He also refers to opposing counsel as "Madame Gold." Appellant's impertinence is noted and does not serve to advance his arguments.

(*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)[4]

At no time did appellant allege any class claims. Issues not raised at the trial court level may not be raised for the first time on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) Thus, we decline to address appellant's arguments regarding class claims.

As to appellant's disparate impact age discrimination claim, the trial court ruled that appellant had failed to administratively exhaust such a claim. No disparate impact claim was filed with DFEH by either appellant or Sperka. Accordingly the trial court sustained respondent's demurrer to this cause of action without leave to amend.

Appellant has failed to show error. Nor can he. There is a "distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact." (*Raytheon Co v. Hernandez* (2003) 540 U.S. 44, 52.) Disparate treatment, which appellant alleged in his DFEH claim, "'is the most easily understood type of discrimination.'" A disparate treatment claim exists when an "'employer simply treats some people less favorably than others'" because of their

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[4] Appellant does not make any legal challenge regarding the trial court's decision to grant summary judgment on his age discrimination and retaliation claims. By failing to include any arguments directed towards the summary judgment order, appellant has forfeited any such arguments on appeal. (California Rules of Court, rule 8.204(a), (c); *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, citing *Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811 ["Issues not raised in an appellant's brief are deemed waived or abandoned]").

protected characteristic. (*Ibid.*) "By contrast, disparate-impact claims 'involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.' [Citation.]" (*Ibid.*) Under a disparate-impact theory of discrimination, an employer's practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate. (*Id.* at pp. 52-53.) "[C]ourts must be careful to distinguish between these theories." (*Id.* at p. 53.)

Here, appellant failed to allege in his DFEH charge that he was subjected to a facially neutral employment policy or practice that disproportionately affected him, as an employee 40 years of age or older.[5]

Appellant initially alleged, consistent with his DHEF claim, that respondent engaged in unlawful conduct by deliberate discrimination. For the first time in his SAC, appellant purported to allege a cause of action for disparate impact age discrimination. Because appellant failed to administratively exhaust this claim, it was properly subject to demurrer. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 [exhaustion of administrative remedy is a jurisdictional prerequisite to resort to the courts].) Appellant makes no legal argument to the contrary.

Appellant appears to argue that the EEOC made an administrative error by failing to include appellant's disparate

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[5] Appellant's DFEH charge alleged only disparate treatment. The charge read: "I believe I have been discriminated against based on my age, 49, which is in violation of the Age Discrimination in Employment Act."

impact and class claims in appellant's original charges. Appellant contends that such error also infected appellant's DFEH charges and culminated in the preclusion of such claims on appeal. However, appellant points to no evidence in the record supporting these factual claims regarding his administrative charge. Nor does he cite any portion of the record where he raised these claims below. Thus, they are forfeited.[6] (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["'The appellate court is not required to search the record on its own seeking error.' [Citation.] Thus, '[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]'"].)[7]

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[6] Respondent claims that nearly the entirety of this section of appellant's brief is copied from a pleading filed against respondent in a different action, which is the reason it contains references to facts not supported by the record in this case. Respondent's suggestion is supported by the language in appellant's opening brief, which appears to have been copied from a federal case arguing for reconsideration of a district court order.

[7] We also ignore appellant's factual arguments, raised for the first time in his reply brief, that his performance was not, as respondent alleges, deficient. Appellant makes no legal argument in connection with these factual assertions, which are explained under a section of his reply brief captioned "STATEMENT OF FACTS." Further, we may ignore issues raised for the first time in an appellant's reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 ["'Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument'"].)

Appellant further argues that the trial court should have granted him leave to amend his complaint. We find no abuse of discretion in the trial court's denial of leave to amend appellant's disparate impact age discrimination claims. A one-year limitations period applies to the filing of a DFEH administrative charge. (Gov. Code, § 12960, subd. (d).) At the time that appellant filed the SAC alleging disparate impact claims for the first time, he had been laid off for over three years.[8] Thus, appellant could not have cured his failure to exhaust this claim. No abuse of discretion occurred.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs of appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT

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[8] Appellant's employment terminated in May 2012. The SAC was filed in October 2015.